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JUN 1 1 1998

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

In the Matter of)	CC Docket No. 95-155
Toll Free Service Access Codes)	

Supplemental Petition for Reconsideration of TLDP Communications, Inc.

TLDP COMMUNICATIONS, INC.

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Executive Summary

The recent rollout of the 877 Service Area Code pursuant to the Commission's Fourth Report and Order in CC Docket 95-155, In the Matter of Toll Free Service Access Codes, FCC 98-48, released March 31, 1998, was riddled with irregularities, and many numbers were not assigned on a first-come, first-served basis as the Commission had mandated. The rollout also inflicted irreparable harm on existing toll free number subscribers as third parties, including potential competitors and speculators, seized 877 vanity numbers equivalent to their current 800 numbers and vital to their businesses. These incumbent subscribers, who have invested considerable resources in their existing codes, are virtually without recourse since the Commission's current prohibition against the brokering of toll-free numbers prevents them from retrieving numbers they have lost.

TLDP Communications, Inc. urges the Commission to rectify these problems by eliminating or, in the alternative, modifying its prohibition against the brokering of toll-free numbers. Abolition of the rule against brokering will not only enable incumbent subscribers to protect their investments, but will serve the public interest by reducing customer confusion and the incidence of expensive misdials, and by ensuring the availability of vanity toll-free numbers to small and new businesses currently locked out of the 800 market.

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TLDP Communications, Inc. ("TLDP"), by its attorneys and pursuant to Section 1.3 of the Commission's rules, hereby requests leave to supplement its Petition for Reconsideration in the above-captioned proceeding, filed May 27, 1997 ("Petition"). For the reasons set forth herein, TLDP urges the Commission to eliminate or, in the alternative, modify its prohibition against the brokering of toll-free numbers in light of recent developments which warrant such action.

I. Background

In its pending Petition, TLDP seeks limited reconsideration of the Commission's Second Report and Order in the above-captioned proceeding, In the Matter of Toll Free Service Access Codes, 12 FCC Rcd 11162 (1997) ("Second Report and Order"). Unlike other parties who sought the elimination of the Commission's toll-free number hoarding and brokering prohibitions in their entirety, TLDP's prayer for relief was narrowly focused to address the specific problems raised by the rebuttable presumption of hoarding and brokering which the Commission adopted. TLDP urged the Commission to eliminate the

See, e.g., Petitions for Reconsideration of ICB, Inc. and National Association of Telecommunications End-Users, filed May 27, 1997.

presumption from Section 52.107 of its rules and to declare that only the Commission has authority to render an enforceable ruling that hoarding has occurred. Alternatively, TLDP urged the Commission to (a) provide guidelines for service providers as to how it expects them to enforce the presumption, (b) expand the telemarketing exception set forth in ¶ 40 of the <u>Second Report and Order</u> to include other legitimate uses of toll free numbers, and (c) determine that it is the reseller, not the facilities-based carrier, which has the obligation to enforce the Commission's new rules in a resale scenario.²

At the time of its filing, TLDP refrained from challenging the Commission's anti-brokering rule because it shared the Commission's general belief that the brokering of toll-free numbers "provide[d] motivation for [unlawful] hoarding," contravened the public interest by causing a "quicker exhaustion" of Service Area Codes ("SACs"), and "interfere[d] with the orderly allocation of numbering resources." Second Report and Order, ¶ 38. The chaos occasioned by the recent opening of the 877 SAC pursuant to the Commission's Fourth Report and Order in this proceeding, however, has forced TLDP to reconsider the wisdom of those assumptions, and the bar on number brokering in general.

Contrary to the letter and spirit of the Commission's directive, the distribution of new toll-free numbers on April 5, 1998 was riddled with irregularities, and many numbers were not allocated on a first-come, first-served basis. Existing toll free subscribers suffered irreparable harm as third parties, including potential competitors and speculators, seized

The instant pleading is meant to supplement and not replace the requests for relief in TLDP's original motion for reconsideration.

In the Matter of Toll Free Service Access Codes, CC Docket No. 95-155, FCC 98-48, released March 31, 1998 ("Fourth Report and Order").

877 vanity numbers equivalent to their current 800 numbers and vital to their businesses. Absent a revocation of the Commission's anti-brokering rule, these incumbent subscribers, who have invested considerable resources in their existing codes, will be unable to retrieve the numbers they have lost, and will suffer substantial, irreparable loss. Abolition of the rule against brokering will also serve the public interest in a number of ways, including reducing customer confusion and the incidence of expensive misdials, and ensuring the availability of vanity toll-free numbers to small and new businesses currently locked out of the 800 market.

II. The Release of the 877 SAC on a First-Come, First-Served Basis Has Irreparably Harmed Incumbent Toll-Free Subscribers

As the Commission itself has observed, since their introduction in 1967, toll free numbers have become a very popular and important business tool. In the Matter of Toll Free Access Codes, Fourth Report and Order and Memorandum Opinion and Order, FCC 98-48, released March 31, 1998 ("Fourth Report and Order"). Today "[t]hese numbers comprise a finite and very valuable public resource, one that satisfies an important business function and that is being used increasingly to meet consumers' personal needs." In the Matter of Toll Free Service Access Codes, Notice of Proposed Rulemaking, 10 FCC Rcd 13692 (1995) ("Notice of Proposed Rulemaking").

Until recently, Commission policies have struck a careful balance between protecting the legitimate interests of incumbent toll-free vanity number subscribers, while ensuring the fair, equitable and orderly allocation of toll-free numbers to newcomers. When, for example, the Commission opened the 888 SAC as 800 toll-free numbers were nearing depletion, it allowed 800 vanity number holders to arrange for equivalent 888

numbers to be set aside and protected from potential competitors. More recently, in its Fourth Report and Order, the Commission has established a right of first refusal with respect to such set aside numbers in recognition of the legitimate concerns of incumbents that problems of customer confusion, mis-dialing and new toll free subscribers benefitting from the marketing efforts of 800 subscribers with equivalent numbers were likely to have a serious impact on their businesses. Fourth Report and Order, ¶ 29.

In its <u>Fourth Report and Order</u>, however, the Commission has abruptly abandoned its policies, and abdicated its duty to ensure the fair, efficient and orderly administration of toll-numbers, by depriving incumbent toll-free vanity number subscribers of the ability to protect equivalent numbers in the 877 and future SACs in any meaningful fashion. Pursuant to the Commission's rules, incumbents must now compete for equivalent numbers on a first-come, first-served basis, with no assurance that they will acquire critical numbers, and no remedy if such numbers are lost.

As other parties have already observed, this dramatic policy shift has resulted in absolute chaos, and irreparable harm to incumbent toll-free vanity number subscribers whose equivalent numbers have been reserved by others.⁴ By all reports, the opening of the 877 SAC on April 5 pursuant to the Fourth Report and Order was confused and disorderly, with many RespOrgs "locked out" of the SMS database for an extended period of time while one or more others reserved at least 10,000 numbers. See attached affidavit

See Joint Petition for Reconsideration of The Direct Marketing Association and American Car Rental Association, filed May 4, 1998; Petition for Partial Reconsideration of MCI Telecommunications Corporation, filed May 4, 1998; and Petition for Reconsideration of the Fourth Report and Order for Toll Free Service Access Codes from the Office of Advocacy, United States Small Business Administration, filed May 4, 1998.

of David Greenhaus. Numerous subscribers, who have invested considerable resources to protect and market existing vanity numbers, must now share equivalent numbers with other parties, including potential competitors and speculators, and face the unpleasant prospect of massive customer confusion and asset depreciation. The only way to rectify the damage caused to these customers is to permit them to retrieve numbers by repealing the anti-brokering rules.

III. The Commission's Bar Against Number Brokering Should Be Repealed

The initial outcome of the 877 SAC opening, coupled with the Commission's bar on the brokering of toll-free numbers, have left RespOrgs and incumbent vanity toll free users without any viable recourse for the loss of equivalent 877 numbers. In an unregulated marketplace, incumbent subscribers who failed to obtain numbers critical to their businesses should be able to negotiate the purchase of these numbers on an arms-length basis. The Commission's prohibition on toll-free number brokering, however, explicitly bars such an approach.

The Commission's "solutions" to this dilemma -- consumer education and trademark protection litigation -- are costly, time consuming, and ineffectual. While TLDP generally shares the concerns of parties who have petitioned for reconsideration of the <u>Fourth Report</u> and <u>Order</u>, these pleadings are likewise unavailing since they will not restore equivalent vanity toll-free numbers which subscribers have lost. In short, brokering is the only feasible

Specific proposals by petitioners seeking modification or clarification of the Fourth Report and Order are both ineffectual and self-serving. The Direct Marketing Association and American Car Rental Association, for example, propose regulatory solutions for marketplace problems by limiting retrieval of equivalent vanity or branded numbers to incumbents who have successfully established in a formal complaint proceeding that hoarding, warehousing, or attempting to broker a

means of redressing the harm which incumbent subscribers have suffered as a result of the Commission's decision not to permit pre-reservation of 877 numbers and the total failure on the part of the SMS contractor to open the 877 SAC in conformance with the Commission's "first-come, first-served" directive.

This harm cannot be minimized. As Commissioner Furchtgott-Roth observed in his Dissenting Statement to the <u>Fourth Report and Order</u>, many subscribers to toll-free numbers have invested substantial resources in advertising to develop an association with particular products or services. The Commission's ruling "does not provide an adequate protection for those entities that have already invested heavily in the marketing of their toll free vanity numbers, and may discourage others from investing similarly in the future ... [T]hese adverse impacts on the market are only compounded by the Commission's anti-brokering rules ... Thus, the Commission's own regulations prohibit the free market from resolving these concerns."

complementary toll-free number has occurred. Such a solution, however, will not benefit an incumbent whose complementary number has been acquired by an unscrupulous competitor or trademark infringer whose marketing campaigns are designed to confuse customers. More fundamentally, it seeks to regulate commercial activity which should be left to the free market. Equally disingenuous is the proposal by MCI Telecommunications for a special right of first refusal limited to the assignment of vanity toll-free access numbers "such as 1-877-COLLECT (which MCI was unable to obtain at the opening of the 877 toll-free code)." MCI Petition, p. 2. TLDP respectfully submits that it is the height of arrogance for MCI -- which opposed reservation of 877 codes -- to now seek preferential treatment for carriers such as itself (who bear much of the responsibility for the problem) only after its own valuable toll-free number has been lost. In essence, MCI is arguing that others should not be able to piggyback on MCI's investment in 800-COLLECT, but that it is OK for all of their customers, and every non-telecommunications company in the country, to lose out after opposing reservation. Such a proposal is patently self-serving and should be rejected by the Commission.

⁶ Certain publicly traded corporations have based their businesses on the continued availability of easily recognizable vanity toll free numbers. <u>See</u>, e.g., SEC

A. The Anti-Brokering Rule Does Not Fulfill Its Purpose

The historical record plainly illustrates that the Commission's current bar on toll-free number brokering does not fulfill its intended purpose, and that the benefits of repealing the rules outweigh the costs. As initially conceived, the bar against number brokering was designed to slow down the exhaustion of toll-free SACs, promote the orderly allocation of numbering resources, and deter unlawful hoarding. Second Report and Order, ¶ 38. As the rollout of the 877 SAC showed, however, there was no significant drain on the resource beyond an initial flurry of companies attempting either to replicate their existing 800 and 888 numbers or to obtain vanity numbers corresponding to those held by current 800 and 888 subscribers. As of April 18, 1998 -- two weeks after the 877 opening -- there were 352,157 877 numbers in use. This is a very similar number to the 374,000 numbers put into the setaside pool for 888, and suggests that one can expect a similar number of replications with each subsequent code opening. This constitutes only 4.4% of the total available numbers in each code, and therefore represents a meaningless portion of the total resource. If this percentage is an accurate gauge of the volume of toll-free numbers having market value, the lifting of the prohibition on number brokering to allow incumbents to transfer control of numbers is unlikely to have a significant impact on the volume of numbers reserved. Moreover, while the abolition of the bar against brokering would allow for changes in vanity number subscribers, there is no evidence that such action will cause any acceleration in the depletion of the resource.

Nor is there any evidence that the Commission's bar on toll-free number brokering

Form 10-K of 800 Travel Systems, Inc., and Form S-1 of 1-800 CONTACTS, Inc.

has effectively prevented hoarding and warehousing. As defined by the Commission, hoarding and warehousing are activities readily distinguishable from brokering, and there is no rational basis for concluding that the brokering of numbers stimulates hoarding or warehousing. Presumably, carriers warehouse numbers to offer to their preferred customers, and not to resell. Likewise, the Commission can easily abolish its prohibition against brokering while leaving intact its bar against hoarding. As TLDP noted in its initial Petition for Reconsideration, the Commission has already carved out an exemption from its general bar against hoarding with respect to telemarketers who perform legitimate activities, and this limited exception can be expanded to include other applications without sacrificing the Commission's policy goals. The success of the anti-hoarding rules is not dependent on the anti-brokering restriction. See TLDP Petition for Reconsideration, filed May 27, 1997, pp. 3-6.

B. Abolition of the Anti-Brokering Rule is in the Public Interest

Abolition of the Commission's bar against toll-free number brokering would also advance many important public interest benefits, including but not limited to the following:

- Redress. As noted above, the purchase of equivalent 877 vanity numbers is the only effective means by which incumbent subscribers can redress the damage incurred by the recent 877 SAC rollout. Abolition of the bar against brokering would enable incumbent subscribers to protect their commercial investments and restore confidence in the Commission's toll-free regime.
- <u>Trademark Litigation</u>. As the Commission itself has recognized, the assignment of toll-free numbers on a first-come, first served basis is likely to trigger an explosion of trademark disputes. <u>Fourth Report and Order</u>, ¶27. Such litigation, which is both

time-consuming and expensive, running to several millions of dollars, is not a viable option for many businesses. The Commission can easily reduce such conflicts, and the substantial social and economic costs they entail, by allowing parties to purchase rights to use toll-free numbers at fair market value. The perpetuation of the anti-brokering rule does nothing more than transfer the Commission's responsibilities for fair and efficient number assignment to the courts, and will result in continued uncertainty and inefficient number usage.

- <u>Commission Resources</u>. The perpetuation of the anti-brokering rule also burdens the Commission's scarce enforcement resources. Eliminating these restrictions will relieve the agency's staff from the burden of what could develop into a huge backlog of enforcement and complaint proceedings.
- Economic Benefits. There are extremely strong market forces which motivate businesses to try to replicate their valuable toll free numbers, and which drive businesses to locate and acquire the numbers they need -- whether directly through the SMS database, or through alternate channels. These activities are likely to continue regardless of any rules to the contrary, only because they represent reasonable, beneficial and efficient free market practices. There is no justification for regulations which prohibit economic activity which is so widely accepted, in order to prevent practices which occur infrequently and have an extremely negligible impact on the exhaustion of the resource. Rules against brokering, prohibiting the free transfer of toll free numbers between subscribers, are unnecessary, lead to

⁷ MCI Petition for Reconsideration, p. 6.

- restrictions on a fair and competitive marketplace, and are not in the public interest.
- Resource Conservation. Brokering rules do nothing towards conserving the resource. In this connection, the Commission should be concerned primarily with the conservation of the resource, and should not seek to intervene in legitimate activities of users in the marketplace -- particularly those which involve the reallocation or nature of the use of resources which are already taken out of the available pool. The first-come, first-served regime adopted by the Commission in the Fourth Report and Order did not conserve a single toll-free number, but simply determined who acquired them, as the 877 rollout illustrated.
- Value of Numbers. It is axiomatic that certain vanity numbers are worth more to some subscribers than others, because of the nature of their respective businesses, and it is in the country's best interest to allow transfers of such numbers. For example, if a small mail order business has the number which spells 800-PLUMBER, but is not using the mnemonic, everyone loses if someone who wants to start a plumbing referral business cannot acquire the number. Similarly, if a meat-packing companies holds a number which happens to spell 1-800-SEINFELD, it is hard to conceive the public interest that is served in preventing the purchase of that number by someone who would like to use it to market a video film library.
- New Companies. New businesses are being founded all the time, and many will inevitably determine that they require a vanity 800 number. Today, however, there is almost no way of obtaining one, and it is impossible to obtain one that is easy to remember. As a practical matter, only businesses which were founded before 1998 are entitled to easy-to-remember numbers.

New and expanding companies are generally at a competitive disadvantage when it comes to obtaining a good vanity number. There is a clear perception that each succeeding code is less valuable than the last, yet the more valuable codes (800 and 888) are no longer available. Large carriers -- those with quickest access to the database as new codes are opened -- are not likely to give priority to small businesses trying to obtain good numbers. Recognizing the need to allow businesses to buy and sell their rights to toll free numbers would provide a much needed mechanism for new and growing businesses to obtain parity with their competitors.

Reduction of Customer Confusion. Vast consumer confusion, mis-dial problems, trademark infringement, and unfair trade practices will continue to result from situations where different parties have similar toll free numbers. This issue existed when 800 was the sole toll free prefix, as companies had similar numbers (i.e., 800 FLOWERS vs. 800 4 FLOWERS). Anecdotal evidence suggests that businesses corrected the problems to a large extent by entering into arms-length agreements for the transfer of numbers. With new codes the problems will be much more severe and will increase greatly in occurrence (i.e., 800 FLOWERS vs. 877 FLOWERS vs. 866 FLOWERS, etc.).

With respect to misdials, new problems arise all the time. One of TLDP's customers recently had a problem when Texaco turned up a new number to its credit card center, and the customer was getting dozens of calls a week. It was clearly not in anyone's interest when Texaco customers were leaving messages on a residential answering machine reporting lost credit cards. It is only through the open market ---

- negotiated agreements between the parties involved -- that these problems are efficiently addressed.
- Contribution to Tax Base. Every time there is an acquisition of a toll-free number, the economy will benefit (the acquiring party seeks the number because it believes that the number is worth more than it is paying) and the country will benefit, because part of the consideration goes directly to the Treasury, in the form of income taxes. Perpetuation of the anti-brokering rule deprives the economy and the public of these tangible benefits.

The Commission's bar against the brokering of toll-free numbers is, finally, at direct odds with the Commission's general support of the operation of market place forces in other settings. In the wireless arena, for example, radio licenses are not only sold to the highest bidder, but the Commission has allowed licensees to partition service areas and disaggregate spectrum to unaffiliated third parties at negotiated rates. These initiatives, the Commission has recognized, serve the public interest by promoting more efficient spectrum use. The Commission's differential treatment of vanity numbers has no rational justification and should be abandoned.

IV. Conclusion

For the reasons set forth above, TLDP respectfully submits that the brokering of toll-free vanity numbers will stimulate economic activity and encourage the more efficient utilization of a scarce resource while in no way contributing to the rate of exhaustion of the resource. No one is required to buy or sell the rights to use toll-free numbers, but it is in the best interests of the country to give every one who wants the option of acquiring such rights to do so. The alternative is the current situation, where a black market will develop, and

parties may be tempted to circumvent the Commission's rules to meet marketplace realities. Such an outcome is not in anyone's interests, frustrates the public interest, and only rewards those who violate the Commission's rules. The abolition of the rule against brokering is the only effective way to rectify the damage which the 877 rollout has inflicted on incumbent subscribers and the general public, and should be adopted.

WHEREFORE, TLDP Communications, Inc. respectfully urges the Commission to grant the relief sought herein.

Respectfully submitted.

TLDP COMMUNICATIONS, INC.

Βv

Fric Fishman

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June 26, 1998

DECLARATION OF DAVID GREENHAUS

- 1. I am David Greenhaus, Vice President of TLDP Communications, Inc., General Partner of The Long Distance Partnership, L.P., in Burlington, Vermont. The Long Distance Partnership is an affiliate of TLDP Communications, Inc.
- 2. The Long Distance Partnership is a RespOrg (ID No. LPS01). The Partnership is also a switchless reseller, providing 1+, toll free and calling card services to its customers. The Partnership markets its services through a variety of channels, including affinity marketing through non-profit institutions and shared use 800 services marketed by direct mail and business-to-business teleselling.
- 3. The Long Distance Partnership invested over \$25,000 to ready ourselves for the 877 code opening on April 5, 1998, including setting up a 56k dedicated line and programming scripts to automatically dial in and submit reservations to the database. Our system was thoroughly tested, and, based on tests that we had conducted in the weeks before the opening of the database, we determined that we could reserve numbers from the database at a rate of approximately two to three seconds per reservation. We had a crew of eight staff members in the office that Sunday, to set up and monitor the process.
- 4. We had 10 PCs a combination of dial-up access and dedicated which started on schedule and received a variety of initial responses "number was available," number already reserved," etc. Within seconds, everything froze. We received no further responses for the next 20 minutes. We took down some of the dedicated and dial-up sessions and restarted them. The system response was the same.
- 5. After roughly 20 minutes, we started to see some action, but very slow, 2-10 minutes between responses. Certain sessions were getting faster service although there seemed to be no rhyme or reason. One dial-up session, on one of our slowest machines (486-66) had the most success.
- 6. After about 45 minutes, things started moving at a more reasonable rate, although it was more than 2 hours before we ran through the list of numbers requested by our customers and cleared all connections as opposed to the 5-10 minutes that we had projected based on the tests conducted in the preceding weeks.
- 7. SNAC Monitoring Call. Throughout most of the day there was an open conference bridge maintained by SNAC for RespOrgs to share information, questions and concerns related to the code opening. I was monitoring that call along with many

other RespOrg representatives—including representatives of the largest RespOrgs. Based on the information received in the contemporaneous conference call, during the first hour, most RespOrgs seemed to be in the same boat as we were experiencing severe delays and unresponsive screens, waiting for confirmations that weren't coming, etc. Frustrations seemed to be running quite high (even among MGI users). During the lockout, however, a representative from DSMI came on the conference bridge and mentioned that 10,000 numbers were reserved. This, at the same time many RespOrgs were reporting that they were "hung up" and unable to reserve numbers.

I hereby declare, under penalty of perjury, that I have reviewed the attached Petition for Reconsideration of TLDP Communications, Inc., and that the statements therein, and in this Declaration, are true and correct.

Executed:

June 25, 1998

Duil A. Mha

CERTIFICATE OF SERVICE

I, Eric Fishman, do hereby certify on this 26th day of June, 1998, that a copy of the foregoing Supplemental Petition for Reconsideration of TLDP Communications, Inc. in CC Docket No. 95-155, was served upon the parties listed below, via first class mail, postage pre-paid.

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